IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.1107 OF 2001

1.Jagadish Hari Thatte
2.Suresh Hari Thatte
3.Chandrakant Hari Thatte
4.Ravindra Hari Thatte
5.Mrs.Saral Waman Saraf
6.Mrs.Shakuntala Sudhakar Nerurkar
7.Sunanda Achyut Oak ...Appellants

vs.

1.Municipal Corporation of Greater Mumbai
2.The State of Maharashtra ...Respondents

Mr.Pankaj Thatte i/b M/s.Thatte & Co. for the Appellants
Ms Geeta Jogalekar for the Respondent-B.M.C.
Mr.R.S.Khadapkar,A.G.P. for State.

CORAM: A.S.OKA,J.
DATE : MARCH 14,2007.

ORAL JUDGMENT:

1. Heard learned Counsel appearing for the parties. The Appellants are the original Plaintiffs. By a Judgment and Order impugned in this Appeal, the learned Judge of the City Civil Court, Mumbai returned the plaint to the Appellants for presentation to the proper forum. The learned Judge held that the suit filed by the Appellants was barred by section 149 of the Maharashtra Regional and Town Planning Act,1966 (hereinafter referred to as the said Act of 1966).

2. This Appeal was placed for final hearing on 18th February 2005. The learned Counsel for the Appellants relied upon the decision of the learned Single Judge of this Court in the case of Kusumkant T. Nagda Vs. Mariambi Ibrahim (2005 (1) All

M.R. page 255. He submitted that in the present case issue of jurisdiction framed by the Trial Court was not decided as the preliminary issue and after recording evidence on all the issues, the learned Trial Judge could not have passed an order of returning the plaint. He pointed out that without deciding other issues, plaint could not have been returned. At that time a submission was made by the learned Counsel for the Respondents that the view taken by this Court in the case of Kusumkant Nagda (supra) needs reconsideration.

3. This court passed an order on 18th February 2005 referring the following issue to a larger Bench of this Court:

. "While deciding the suit finally after parties have led evidence on all issues when a court come to the conclusion that it lacks jurisdiction to hear and decide the suit, whether it is necessary for the Court to decide other issues on merits at the time of or before passing the order of return of Plaint."

4. Accordingly, the Hon'ble the Chief Justice made a reference to a Division Bench of this Court. By a Judgment and Order dated 15th December 2006, the Division Bench came to the conclusion that the view taken by the learned Single Judge in case of Kusum Nagda (supra) is correct.

5. In the light of the decision of the Division Bench of this

Court, the learned Counsel for the Appellant now submitted that the order of the Trial Court is illegal in as much as the learned Trial Judge ought to have recorded the findings on all the issues. He submitted that in view of the decision of the Division Bench, the suit will have to be remanded to the Trial Court. The learned Counsel for the Respondent supported the impugned order by contending that there is a clear bar under section 149 of the said Act of 1966 and therefore, the learned Judge was justified in passing the impugned order.

6. I have considered the submissions. I have already referred the issue which was framed for decision of a larger Bench. It will be necessary to refer to the decision of the Division Bench. In paragraph 11, the Division Bench has considered the provisions of the Code of Civil Procedure, 1908. The Division Bench in the said paragraph proceeded to hold as under :

"11....If we carefully consider the provisions of Order XIV rule (2)(1) and (2) together, then, it is absolutely clear that once the course contemplated under sub rule (2) of rule 2 of Order XIV of the said code is not followed by the court then the court must necessarily follow the other course which says that the court shall record the findings on all the issues. If, even after not adopting the course contemplated under sub rule (2) of rule 2 of Order

XIV, court is allowed to dispose of the matter merely on one issue of jurisdiction or maintainability, even after full trial of the suit, then it would amount to allowing the court to proceed against the letter and spirit of the amended mandatory provision of Order XIV Rule 2(1). **So, once the parties and the court have chosen not to try the issue with regard to jurisdiction or maintainability of the suit as a preliminary issue and on the contrary evidence is led on all the issues and the matter is fixed for final order or judgment then it is necessary for the court to record findings on all the issues. If the court is allowed to pass final order without giving finding on other issues and dispose of the matter simply on the point of jurisdiction at such stage, the very purport of the provision of Order XIV Rule 2 would be defeated.** We are, therefore, of the considered opinion that the view taken by the learned Single Judge of this Court in a case Kusumkant T. Nagda Vs. Mariambi Ibrahim 2005 (1) All M.R.. 255 is correct."

(Emphasis supplied)

7. The issue which was referred to the Bench was answered in paragraph 12 of its decision. Paragraph 12 reads thus :

"12. Incidently, it must be noted that recording of

findings on all issues while deciding the matter finally after the time the parties have adduced evidence is not dependant on the nature of the final order that is to be passed, means whether finally the suit is to be dismissed on the ground of jurisdiction whether plaint is to be returned. **"Whatever be the order, when the same is to be passed finally after the parties have led evidence on all issues, then it is necessary for the Court to decide other issues on merits even if the Court comes to the conclusion that it lacks jurisdiction."**

(Emphasis added)

8. Thus, the Division Bench has held that even after not adopting the course contemplated under sub rule (2) of Rule 2 of Order XIV of the said Code and after full trial, the court cannot dispose of the the suit merely on one issue of jurisdiction or maintainability. The Division Bench, therefore, held that once the evidence is led by the parties on all the issues and the matter is fixed for final order or Judgment, then it is necessary for the Court to record the findings on all the issues.

9. Turning back to the impugned order, it is apparent that the parties led evidence on all the issues and arguments were heard on all the issues by the learned Trial Judge. Apart from additional issue No.6 framed on jurisdiction, the learned Judge has framed three other main issues dealing with the

merits of the suit. Perusal of the paragraph 30 of the impugned Judgment shows that the learned Judge was of the view that as he had come to the conclusion that the Court had no jurisdiction to try and entertain the suit, it is not necessary to record the findings on all other issues. Thus, in the present case, the Trial Court did not try the issue of jurisdiction as a preliminary issue and the same was tried along with other issues framed on merits and the parties led evidence on all the issues. Thus, the course adopted by the learned Trial Judge of not recording the findings on all the issues is completely contrary to the law laid down by the Division Bench of this Court in the Judgment and Order dated 15th December 2006. The learned Advocate for the Appellants submitted that in fact the decision on the other issues will have a direct bearing on the issue of jurisdiction and therefore issue of jurisdiction will have to be decided afresh.

10. Thus, the only course left upon for this court is to set aside the impugned Judgment and Order and to remand the suit to the Trial Court for recording the findings on all the issues in terms of the decision of the Division Bench. The evidence is already adduced by the parties on all the issues and therefore, now the Trial Court will hear the oral submissions of the Advocates for the parties and will decide the suit afresh in the light of what has been held by the Division Bench of this Court.

11. Hence, I pass the following order :

i) Impugned Judgment and Order dated 26th July 2001 is quashed and set aside and S.C.Suit No.3856 of 1985 is restored to the file of the Trial Court.

ii) In view of the decision of the Division Bench dated 15th December 2006, the Trial Court will have to record the findings on all the issues including the issue as regards the jurisdiction. As parties have already adduced the evidence, the learned Trial Judge will fix the suit for hearing of oral submissions.

iii) After oral submissions are heard, the learned Trial Judge will decide the suit in accordance with the law laid down by the Division Bench of this court in the aforesaid Judgment.

iv) Parties are directed to appear before the Trial Court on 30th April 2007 at 11.00 a.m. for fixing the schedule of hearing of the suit.

v) The learned Trial Judge will decide the suit as expeditiously as possible and preferably on or before 31st August 2007.

vi) Appeal is partly allowed in above terms with no order

as to costs.

vii) Writ to be sent immediately.

viii) Parties and the concerned Court to act upon an authenticated copy of this order.

JUDGE